

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548**

FILE: B-209284.2

DATE: December 2, 1982

MATTER OF: Echelon Service Company

DIGEST:

1. Protest that low bidder (1) is not financially capable of performance, (2) does not have ability to commence performance on date specified, and (3) will be unable to perform at its low price, involves matters of affirmative determination of responsibility, not reviewed by GAO in absence of showing of possible fraud or bad faith.
2. Allegations that preaward survey was not conducted, that awardee has tax lien against it, and that awardee did not meet all requirements during first week of contract performance do not constitute showing of fraud or bad faith in connection with affirmative finding of responsibility, since preaward survey is not required in every case, existence of tax lien does not require a finding of nonresponsibility, and gauging awardee's performance ability was within the subjective business judgment of the contracting officer.

Echelon Service Company protests the award of a contract to Honor Guard Security Services by the General Services Administration (GSA) for security guard services at the Social Security Administration's Woodlawn Complex, Baltimore, Maryland, under solicitation No. GS-03-82-B-0099. Echelon contends that Honor Guard is not a responsible bidder. The protest is dismissed.

Echelon contends that in making an affirmative determination of Honor Guard's responsibility, the contracting officer either overlooked or ignored the existence of a tax lien against Honor Guard, the apparent necessity for the low bidder to hire, train, equip and arm 130 employees within 10 days, and Honor Guard's inability to perform the contract using employees previously trained and equipped by the incumbent, without a financial loss.

Echelon met with GSA officials prior to the award and expressed its concerns about Honor Guard's responsibility. GSA nevertheless found Honor Guard to be responsible and awarded it the contract. Echelon now states that its concerns have been confirmed by Honor Guard's performance during the first week to 10 days of the contract, in that Honor Guard's employees reported for duty lacking complete uniforms and all the equipment they should have had under the contract's specifications.

Whether a low bidder (1) is financially capable of performance, (2) will be able to timely commence performance, and (3) perform at its low price, are matters of a bidder's general capability to perform, which involves the type of affirmative determination of responsibility generally no longer reviewed by our Office. See E.C. Campbell, Inc., B-204253, February 2, 1982, 82-1 CPD 76. The two exceptions to this rule are where there is a showing (1) that the contracting officer acted fraudulently or in bad faith or (2) that definitive criteria in the solicitation have not been met. Although both exceptions have been invoked by the protester, we dismiss the protest since we conclude that neither applies.

The protester argues that GSA's action in awarding the contract to Honor Guard is "tantamount to bad faith." We have adopted the definition of bad faith as "a malicious and specific intent to injure the party alleging bad faith." Honeywell Information Systems, Inc.--Reconsideration, B-193177.2, January 19, 1981, 81-1 CPD 26. We do not believe Echelon has made a prima facie showing of fraud or such willful disregard of the facts or misconduct as to be tantamount to bad faith.

Echelon was the incumbent contractor for these services as well as the second low bidder under solicitation -0099. It agreed to an extension of its contract from October 19 through October 31, 1982, but refused GSA's request for a subsequent 1-month extension. Echelon states it did not agree to such an extension because it could only serve to give Honor Guard additional time in which to prepare for performance when Echelon thought Honor Guard should have been determined to be nonresponsible and that award should be made to Echelon as the lowest, responsible bidder.

At a meeting held with GSA 5 days before its contract was to expire, Echelon states, it explained to GSA its rationale for refusing to extend its contract further and its belief that Honor Guard was not prepared to commence performance of a contract of this magnitude. According to Echelon, GSA was prepared to make award to Honor Guard because the firm's record of performance was satisfactory and the firm had assured GSA that it would be prepared to commence performance on November 1. In Echelon's view, however, GSA should have conducted a preaward survey of Honor Guard, which Echelon believes would have been unfavorable. This would have resulted in a referral of the matter of Honor Guard's responsibility to the Small Business Administration for a Certificate of Competency which, we gather, Echelon believes would not be issued.

Since there is no requirement that a preaward survey be made in every case, GSA's refusal to conduct one does not provide a basis for finding possible fraud or bad faith. Beacon Winch Company, B-206513.2, May 18, 1982, 82-1 CPD 478. Moreover, the existence of a tax lien does not, by itself, necessitate a nonresponsibility determination. See Domar Industries Co., Inc., B-202735, September 4, 1981, 81-2 CPD 199. Furthermore, even if the protester's allegations as to the deficiencies in Honor Guard's initial performance are correct, that would not establish that the affirmative determination, which in large measure was based on a subjective business judgment, resulted from fraud or bad faith.

The protester also alleges that definitive criteria of responsibility set forth in the solicitation were misapplied by GSA. This contention is without merit because there are no definitive responsibility criteria in the IFB. Bidders were requested to fill in and submit with their bids two forms which related to prior comparable experience, general qualifications and finances. This, of course, is the kind of information typically used by a contracting officer in forming a judgment as to whether a firm is responsible. It did not, however, establish any "definitive" or objectively determinable responsibility criteria.

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What the protester identifies as definitive responsibility criteria are requirements contained in the IFB's specifications as to the uniforms and equipment with which employees are to be supplied and the training they are to receive. To use uniforms as an example, there was no requirement in the IFB that as a prerequisite to award the low bidder document that each employee had been issued a complete uniform. The IFB provision to which the protester refers states that "The contractor, shall, prior to the contract performance date, submit * * * documentation that the following items of uniform and equipment have been issued to each employee." (Emphasis added.) This clearly is a post-award obligation; any failure by the contractor to satisfy it would be a matter of contract administration, not one affecting the validity of the award. See Preventive Health Programs, B-195846, February 20, 1980, 80-ICPD 144.

The protest is dismissed.

Harry R. Van Cleve
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Acting General Counsel